

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 51232-g410 BY JOE R. LEE)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 15, 1988, in the Public Library Building in Choteau, Montana. By order dated May 19, 1988, the record on the above matter was reopened and a subsequent continuation hearing was held on May 25, 1988, in the first floor conference room of the Teton County Courthouse in Choteau, Montana. The record was closed at the conclusion of this hearing.

APPEARANCES

Applicant Joe R. Lee (hereafter "Applicant" or "Applicant Lee") appeared pro se.

Leonard L. Blixrud (hereafter "Blixrud") appeared on behalf of the Farmers Co-op Canal Company.

Tim Saylor (hereafter "Saylor") appeared on behalf of the Eldorado Co-op Canal Company.

CASE #
51232

Bob Larson, Manager of the Havre Water Rights Bureau Field Office, and Marvin Cross, engineer for the same office, attended the hearing in the matter.

Bill Uthman, Department of Natural Resources and Conservation (hereafter "Department" or "DNRC") geohydrologist appeared as staff expert witness.

Not Present at the Hearing

Walter D. Malone Ranch did not appear at the hearing in person or by representation.

PRELIMINARY MATTERS

John Wuerthner appeared as counsel for the Estate of Fred Pelzman with whom the Applicant is involved in a lawsuit involving property interests. The Estate is not an objector of record, and was not given the status of a party to this proceeding. However, no objections were entered to Wuerthner's request to present testimony at the hearing, therefore he was allowed to testify. Since Wuerthner's testimony was irrelevant to the issue in this matter, it has not been given any weight in the decision of this case.

On the hearing held on April 15, 1988, Applicant Lee requested the Hearing Examiner to take "judicial notice" of previous testimony and evidence introduced in various preceding cases, specifically on cases for Application Nos. 31558, 31562, and 36164. The Hearing

Examiner's immediate answer to the Applicant's request was somewhat vague and therefore could have been misinterpreted. Therefore, on the chance that the Applicant might have presented more information at the hearing had the answer been more definite, the Hearing Examiner reopened the case by order dated May 19, 1988, and scheduled a Hearing Continuation for May 25, 1988. This Hearing Continuation was for the purpose of allowing the applicant to introduce more information on his own behalf, including, but not limited to, any relevant reports from the aforementioned previous cases. This Hearing Continuation also allowed the Objectors to cross examine the Applicant and to object to any evidence introduced by the Applicant.

At the May 25 Continuation Hearing, Applicant Lee filed a document (see Exhibit A) titled "Request to Make Additions and Complaint". Applicant Lee, through Exhibit A and verbally, asked that the record in this matter be left open for submission of additional information on his behalf. The Hearing Examiner hereby denies the request for submission of additional information based on the ground that the Applicant had an adequate period of time prior to the hearing in which to prepare his case.

Applicant Lee filed the application in this matter on January 12, 1983. The Department by letter dated September 9, 1983, notified Mr. Lee that four objections to his application were filed. As indicated by a memorandum in the file from Marvin Cross, engineer in the Havre Field Office, sometime prior to January 14, 1984, negotiations to settle the concerns of the objectors to this application had failed

3

CASF # 51232

and on January 14, 1984, the file was sent to the Helena Office to have it scheduled for a hearing. Therefore, Applicant Lee was aware of the need to gather the necessary evidence to prepare his case in this matter as of at least January 14, 1984.

Prior to 1988, the Hearings Unit in the Helena Office attempted to set a hearing date on this application in at least three instances, but a hearing date on this application was not set due to Applicant Lee's requests to continue the case in order for him and/or his lawyer to prepare the case. Finally on March 15, 1988, the hearing in this matter was scheduled for April 15, 1988. Applicant Lee again filed a Motion for Continuance based on insufficient time for Mr. Lee's attorney to review the case. Applicant Lee was advised by the Hearing Examiner in a letter dated April 6, 1988, that a continuance would only be granted if Applicant Lee would get the objectors in this matter to agree to the continuance. Being unable to obtain an agreement from the objectors, the Hearing Examiner denied the Motion for Continuance.

Having heard the evidence presented at the contested case hearing held on April 15, 1988, the Hearing Examiner decided to reopen the case to allow the Applicant another opportunity to present any evidence on his behalf that he might have withheld due to an ambiguous answer given by the Hearing Examiner during the hearing (see letter to Applicant Lee, dated April 29, 1988). Consequently, a second or rather a continuation hearing on this matter was scheduled and heard on May 25, 1988.

CASE #

Therefore, based on the fact that Applicant Lee was aware that he would have to defend his position as applicant in the this case since before January 14, 1984, and based on the fact that the record has already been reopened once by the Hearing Examiner after the April 15, 1988 hearing to allow the applicant to introduce evidence on his behalf at an additional hearing on May 25, 1988, the Hearing Examiner denies any requests by Applicant Lee to leave the record open for submission of additional evidence.

Also, Applicant's Exhibit A attempts to shift the applicant's responsibility of researching the records for the evidence the applicant needs to a Department employee.

The Department's records are open to the public, and as such any member of the public is welcome to look and research through the voluminous reports, letters, tapes, and other documents he may feel would be pertinent to his specific situation. Department employees may assist him by reproducing copies of documents identified as important for his case. This service, however, must be requested a reasonable time prior to when the copies are needed. Applicant's demands that the Department research records and make copies for him on a few days notice is clearly unreasonable. Therefore, based on the aforementioned, on the ambiguous complaint on Applicant's Exhibit A, and on Applicant's testimony that the material he wished to submit consists of lengthy excerpts from previous hearings which to the Hearing Examiner's knowledge may not even exist in transcript form, and which the Applicant has made no attempt to obtain on his own, the Hearings Examiner finds Applicant Lee's complaint to be without merit.

CASE #

51232

EXHIBITS

Applicant Lee submitted four exhibits for inclusion in the report.

Note: Exhibit numerically marked was introduced at the April 15, 1988, hearing. Exhibits alphabetically marked were introduced at the May 25, 1988, hearing.

Applicant's Exhibit 1 is an enlarged copy of a portion of a USGS topographical map showing the Applicant's proposed places of use.

Applicant's Exhibit 1 was admitted without objection.

Applicant's Exhibit A is a document titled "Request to Mark Additions and Complaint".

Applicant's Exhibit A was admitted without objection.

Applicant's Exhibit B is a 3" x 5" 35mm color print showing several head of livestock feeding in the foreground and five drilling rigs in the background.

Applicant's Exhibit B was admitted without objection.

Applicant's Exhibit C is a 5" x 7" 35mm color print showing a hay field with pools of water at different locations.

Applicant's Exhibit C was admitted without objection.

FINDINGS OF FACT

1. MCA, Section 85-2-302 (1985) provides that, except in the case of certain groundwater and livestock appropriations listed in MCA Section 85-2-306 (1987), "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." This Applicant has not made application for appropriation of waters as described under MCA Section 85-2-306 (1987). Therefore, MCA Section 85-2-302 applies in this matter.

2. The application in the matter was regularly filed with the DNRC on January 12, 1983, at 1:52 PM.

3. The pertinent portions of the application were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on August 11th and 18th, 1983.

4. Applicant Lee seeks a permit to divert groundwater by means of a shallow (15 to 30 feet) "pit" well to be located in the NW 1/4 NW 1/4 SW 1/4 of Section 21, Township 25 North, Range 06 West, Teton County, Montana, at a rate of 500 gallons per minute (gpm) of water up to 200 acre-feet (AF) of water per year for new and supplemental flood irrigation of 185.5 acres on the following described lands:

8.5 acres in the NW 1/4 NW 1/4 SW 1/4 of Section 21 (new irrigation)
7.0 acres in the NE 1/4 NW 1/4 SW 1/4 of Section 21 (new irrigation)
3.0 acres in the N 1/2 NE 1/4 SW 1/4 of Section 21 (new irrigation)
17.0 acres in the S 1/2 SW 1/4 NE 1/4 of Section 21 (supplemental irrigation)
38.0 acres in the SE 1/4 NE 1/4 of Section 21 (supplemental irrigation)

20.0 acres in the N 1/2 NW 1/4 SE 1/4 of Section 22 (new irrigation)
15.0 acres in the SW 1/4 NE 1/4 of Section 22 (new irrigation)
9.0 acres in the S 1/2 NW 1/4 SW 1/4 of Section 22 (new irrigation)
10.0 acres in the S 1/2 NE 1/4 SW 1/4 of Section 22 (new irrigation)
10.0 acres in the S 1/2 NW 1/4 SE 1/4 of Section 22 (new irrigation)
8.0 acres in the S 1/2 NW 1/4 of Section 22 (new irrigation)
All in Township 25 North, Range 6 West, Teton County, Montana

The proposed period of appropriation is from May 15th through October 15th inclusive of each year.

5. At the hearing Applicant Lee amended the application by reducing the originally applied for diversion rate from 1000 gpm to 500 gpm and the volume of water to be used per year from 400 AF to 200 AF (testimony of Applicant).

6. Applicant Lee described the proposed "pit" well development as a well which will be drilled at the bottom of a pit. The pit will be excavated as a source to obtain gravel and will be dug to a depth above the water table. This pit will cover approximately three acres. The pit is to be located in a place where surface water will not flow into the pit (testimony of applicant).

7. Water will be pumped from the well into a ditch and conveyed to the lands to be irrigated. In general, the lands to be irrigated slope in a northeasterly direction (testimony of applicant). Applicant Lee also stated the possibility of changing to a sprinkler irrigation system in the future.

8. The proposed means of diversion are adequate for the contemplated use. The construction of the well is governed by rules and statutes which are administered by the Montana Board of Water Well Contractors. Having heard no objections to the construction of the proposed means of

diversion, and finding no evidence in the record to indicate that said means of diversion is not adequate, the Hearing Examiner finds that the proposed means of diversion is adequate to accomplish the intended irrigation.

9. Applicant's Exhibit C, a 5" x 7" color photograph, shows shallow water pools, of different dimensions, standing at various locations within a hay field. Applicant Lee offered no information as to the time of the year this photograph was taken, however, due to the color of the vegetation on this print one can safely assume this photo was taken either early spring or late fall. Also, the lack of vegetation normally associated with water abundant areas, such as cattails, willows, etc., indicate that water is present on the surface only during short period(s) of time. What cannot be ascertained by looking at Exhibit C is whether the occurrence of water is due to high groundwater level or said waters are the remains of surface runoff. However, the Hearing Examiner finds Applicant's Exhibit C indicative of water saturated soils, at a specific location at some time during the year.

10. The file on record contains two geohydrologic reports concerning the application in this matter. The first report was made by Kathy Hampton, former DNRC geohydrologist, and is dated May 24, 1984. The second report was made by Brian Harrison, former DNRC geohydrologist, and is a review of the first report. Harrison's report is dated November 8, 1985. Neither Hampton nor Harrison are presently employed by the Department. However, Bill Uthman, a current DNRC geohydrologist, testified at the hearing by reviewing, explaining, and summarizing Harrison's report. It is obvious from reading Harrison's report and from Mr. Uthman's discussion of the

Harrison report, that the Harrison report contains the most current information available on the area. Since a geohydrologist who has reviewed the report was present at the hearing and available for cross-examination of this information and since no party objected to the inclusion of the Harrison report in the record, Harrison's geohydrologic report is the report the Hearing Examiner refers to for technical information on the proposed project.

11. Harrison's geohydrologic report clearly indicates that the lack of substantial information on the aquifer's hydraulic conductivity, the aquifer's thickness, the semi-confined vs. unconfined aquifer manner and the nature of the Outwash Gravel/ Two Medicine formation contact, makes it difficult at best to even make a prediction on the possible impacts of the proposed appropriation.

Harrison's report suggests the need to perform a pump test to determine the aquifer characteristics, such as transmissivity, storage coefficient, and the lateral extent of the cone of depression based on any given pump withdrawal rate.

Applicant Lee did not introduce any evidence that would assist in determining some of the unknown factors which the Harrison report addressed. Applicant Lee also did not question or contradict any of the information in the Harrison report.

12. Objector Eldorado Canal/Saylor filed a timely objection based on the possibility that the proposed project will develop saline seep areas below the proposed place of use and above the Eldorado Canal. The objector

alleges that surface water runoff, which is presently picked up by the Eldorado Canal, will carry these salts to the canal, therefore, adversely altering the water quality in the canal. (See objection on file.)

Harrison's geohydrologic report addresses Objector Eldorado Canal/Saylor's objection as follows: The concern of the Objector Eldorado Canal/Saylor as to the possible creation of saline seep areas is very possible. However, the creation of saline seep areas would not be due to the withdrawal of groundwater, but rather to the mismanagement of water once it is withdrawn. (See Harrison report on file.)

Saylor offered no other evidence or testimony at the hearing.

13. Objector Farmers Co-op Canal Company filed a timely objection alleging that the proposed project will withdraw water from the same source from which the Farmers Canal takes water. (See objection on file.)

However, Blixrud testified that the Farmers Canal goes through gravelly soils and loses up to 50% of its water until the soil profile is saturated. This information is from a survey conducted by Tom Patton of the Bureau of Mines and Geology. Therefore, the alleged adverse effect would occur because the well would drain the saturated soils causing the canal to lose more water from the ditch.

The Farmers Canal is approximately 1.25 to 1.5 miles from Applicant Lee's proposed pit well (information on file).

Harrison's geohydrologic report states that it is impossible to determine the extent of the impact of the proposed project on Objector

Farmers Canal present use of water without more specific information. (See Harrison report on file.)

14. Blixrud testified that Ray Anderson received a Permit to utilize groundwater by means of a well and that approximately 3 or 4 years ago Anderson had to shut off his use of groundwater because he was depleting the groundwater aquifer from which other people depended. Anderson's well is located approximately 12 to 13 miles east of Applicant Lee's proposed pit well.

Blixrud also testified that the "Feedlot Well," which is located 7 to 8 miles "below" Applicant Lee's proposed pit well, made the Bert Guthrie spring quit flowing.

Blixrud stated that Leslie Chalmers had a well, east of the Anderson well, and that Chalmer's well depleted the aquifer to the point where the free flowing wells of his neighbors quit flowing.

15. Blixrud testified that Tom Patton of the Bureau of Mines and Geology is doing an extensive groundwater study of the area. The conclusions of Patton's study were not finalized as of the date of this hearing. However, Blixrud, by talking to Patton and by his own knowledge of the area, contends that the Anderson well, the Feedlot well, the Chalmers well, and Applicant Lee's proposed well all tap the same aquifer.

16. Bill Uthman, DNRC Geohydrologist, testified that the ability to withdraw water at the requested rate is questionable since the aquifer may be too thin to sustain a withdrawal of 500 gallons per minute (gpm).

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate;
and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

CASE #

4. The proposed use of water, irrigation, is a beneficial use of water. See MCA 85-2-102(2). See also Finding of Fact 4.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 8.

The objection by Eldorado Canal is based on the potential for saline seep acres to be created by the development of Applicant Lee's project. Harrison's report addresses this potential problem by stating that the withdrawal of groundwater, in itself, does not create saline seep areas, but rather the potential for creating saline seep areas lies in the improper application of the groundwater to the lands to be irrigated. See Finding of Fact 12. The evidence on record indicates that the proposed means of operation would apply said water in a reasonable manner.

6. Applicant Lee has not proven by substantial credible evidence that there are unappropriated waters in the source of supply, in the amount the Applicant is seeking to appropriate, at times when the water can be put to the use proposed by the Applicant. This finding is made in conjunction with the conclusion that Applicant Lee has failed to prove by substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

Applicant Lee has proven that water is physically present, at certain times of the year, at the proposed point of diversion. See Finding of Fact 9. However, even assuming that the water is from the applied-for source (groundwater), the mere physical presence of water is not indicative that those waters are unappropriated.

The evidence on record, specifically Harrison's geohydrologic report, indicates that the lack of information on the aquifer's characteristics makes it difficult to predict the possible impacts of the proposed appropriation on Objector Farmers Co-op Canal. See Finding of Fact 11. Not being able to predict the impacts of the proposed appropriation on Objector Farmers Co-op Canal, is synonymous with not being able to prove that the proposed diversion will not divert waters needed for prior appropriators use, or that the proposed diversion will not adversely affect the water rights of another appropriator.

Furthermore, Bill Uthman, DNRC staff expert witness, questioned the relation of the aquifer's thickness, from which Applicant Lee expects to withdraw water, to its ability to sustain the proposed withdrawal of 500 gpm. See Finding of Fact 16.

Applicant Lee did not introduce any evidence delineating some of the unknown characteristics of the groundwater aquifer nor did he introduce any evidence to contradict the information on file or the testimony of Bill Uthman. The Hearing Examiner therefore concludes that Applicant Lee has failed to prove by substantial credible evidence, the specific criteria of section 85-2-311 (1) (a) (i) (ii) (iii) and (b), MCA.

7. Because the Proposal for Decision in this matter is rendered on the basis of a failure of proof, rather than because the parties developed a full record and the evidence weighed against the Applicant, the proposed order is made without prejudice. The applicant may reapply for a Beneficial

Water Use Permit at such time as he may be in possession of the necessary evidence.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 51232-g410 by Joe R. Lee is hereby denied without prejudice.

Done this 20 day of September, 1988

A handwritten signature in cursive script, appearing to read 'Silvio Rodriguez', is written over a horizontal line.

Silvio Rodriguez, Hearing Examiner

Department of Natural Resources & Conservation

PO Box 438

Lewistown, MT 59457

CASE #

51232

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (P.O. Box 438, Lewistown, MT 59457); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA 2-4-621 (1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

CASE #

Parties who attend oral arguments are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

CASE #

18

51232

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address this 27th day of September, 1988, as follows:

Joe R. Lee
Box 154
Choteau, MT 59422

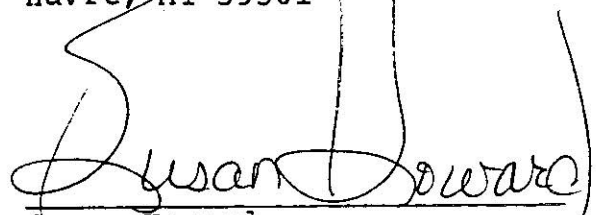
Eldorado Co-op Canal Co.
% Citizens State Bank
Choteau, MT 59422

Bill Uthman
Geohydrologist, DNRC
1520 East Sixth Avenue
Helena, MT 59620-2301

Leonard L. Blixrud
Farmers Co-op Canal Co.
Box 44
Choteau, MT 59422

Walter D. Malone Ranch
Route 2, Box 165
Choteau, MT 59422

Bob Larson
Havre Field Manager
P O Box 1828
Havre, MT 59501



Susan Howard
Hearing Reporter

CASE #

51232